

Supreme Court, U.S.

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NO. 85-499

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

**B. H. PAPASAN, SUPERINTENDENT OF
EDUCATION, ET AL.**
Petitioners

vs.

**WILLIAM A. ALLAIN, GOVERNOR,
STATE OF MISSISSIPPI, ET AL.**
Respondents

**RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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QUESTIONS PRESENTED

A.

Should Certiorari be granted to consider a claim seeking damages against the State of Mississippi, various agencies thereof, and elected public officials of the State of Mississippi in their official capacities under the Fourteenth Amendment which is jurisdictionally barred by the Eleventh Amendment to the Constitution of the United States.

B.

Should Certiorari be granted to consider a pendent state law claim seeking damages against the State of Mississippi, various agencies thereof, and elected public officials of the State of Mississippi in their official capacities which is also jurisdictionally barred by the Eleventh Amendment to the Constitution of the United States.

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**WILLIAM A. ALLAIN, GOVERNOR,
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RESPONSE TO PETITION FOR WRIT OF
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COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. PREFACE

Respondents respectfully pray that petitioners' prayer that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit dated April 5, 1985, and the denial of their Petition for Rehearing and Suggestion of Rehearing En Banc dated May 21, 1985, be denied.

II. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is dated April 5, 1985, and is reported as Papasan, et al. v. United States, 756 F.2d 1087 (1985). The order denying petitioners' Petition for Rehearing and Rehearing En Banc is dated May 21, 1985.

The District Court's order dismissing petitioners' complaint is dated January 30, 1984, and is unpublished.

III. JURISDICTION

Petitioners seek to invoke jurisdiction by way of a Petition for Writ of Certiorari under the authority of 28 U.S.C. § 1254(1). Respondents submit, however, that this matter presents no substantial federal question.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those identified by petitioners, respondents submit that the following should also be considered by the Court:

United States Constitution,
Amendment XI

V. STATEMENT OF THE CASE

Petitioners filed their complaint on June 12, 1981, in the United States District Court for the Northern District of Mississippi naming therein as state defendants¹: "The State of Mississippi; William F. Winter, Governor, State of Mississippi²; Edwin Lloyd Pittman, Secretary of State, member of the Board of Education, and member of the Lieu Land Commission, State of Mississippi³; Charles E. Holladay, Superintendent of Education, member of the Board of Education, and member of the Lieu Land

¹ All state defendants are jointly referred to herein as "state defendants," and the state officials named will be referred to as "individual state defendants."

² Now succeeded in office by William A. Allain.

³ Now succeeded in office by Richard Molpus. As noted in footnote 4, infra, the Secretary of State is no longer a member of the State Board of Education.

Commission, State of Mississippi⁴; William A. Allain, Attorney General, member of the Board of Education and member of the Lieu Land Commission, State of Mississippi⁵; A. Michael Espy, Assistant Secretary of State, State of Mississippi."⁶ Each of the individual state

⁴ This elective position of Superintendent of Education was abolished effective July 1, 1984, pursuant to amended Section 206 of the Constitution of the State of Mississippi, approved by referendum on November 1, 1983, and Section 37-3-39(2)(a) of the Mississippi Code of 1972, as amended. The constitutional amendment further removed the Superintendent of Education, the Attorney General, and the Secretary of State as members of the State Board of Education.

⁵ Now succeeded in office by Edwin Lloyd Pittman. As noted above, the Attorney General of the State of Mississippi is no longer a member of the State Board of Education.

⁶ No longer holds this position nor was he ever a member of the Board of Education or the Lieu Land Commission.

defendants and their "predecessors in office" were named in their official capacity only.

The petitioners are the county superintendents and boards of education in all or part of 23 counties and school children and parents in those counties. The crux of the allegations is that when the Chickasaw Tribe ceded its lands in Mississippi under the Treaty of Pontitock Creek⁷ in 1832, the United States failed to to reserve the sixteenth sections located therein from the sale of all Chickasaw lands by the United States at public auction in order that the Chickasaw nation could "realize the greatest possible sum" therefrom.⁸

⁷ For simplicity, other references to this treaty will use the modern spelling of "Pontotoc."

⁸ Article I, Treaty of Pontotoc.

Subsequently, pursuant to an Act of Congress on July 4, 1836⁹, authority was granted for the counties then existing in the Chickasaw Cession to select the "lieu land" outside the counties, and this was accomplished. These lands were subsequently leased for ninety-nine (99) years in 1848 and were subsequently sold¹⁰ as ratified by the Act of Congress of May 12, 1852.¹¹ The funds were then invested in railroad companies to secure the construction of railroads throughout the state. Due to the destruction of the railroads during the civil

⁹ 5 Stat. 116.

¹⁰ Of interest is that representatives of the Chickasaw Cession counties voted in favor of these acts. Miss. House Journal of 1848, pp. 388, 537; Miss. Senate Journal of 1848, p. 711.

¹¹ 10 Stat. 6.

war, the securities received for such investments were rendered worthless.¹² Despite this, the state has continued to pay interest to the Chickasaw Cession counties on the corpus of the fund.

Section 212 of the Constitution of 1890 of the State of Mississippi established the Chickasaw Cession Lieu Land Fund and set the interest rate thereon.

The petitioners, in their original bill of complaint, seek the following specific relief from the state defendants in the form of "dollars or dirt:"

a. "conveyance to them ... real and/or personal properties (including money) of equivalent income producing value" [as the original Sixteenth Sections in Chickasaw Cession];

¹² The last Act in regard to the Chickasaw Cession lieu lands was in 1859 prior to the adoption of the Fourteenth Amendment to the Constitution of the United States.

b. "conveyance to them ... of other real and/or personal properties (including money) of equivalent income producing value" [as the original Chickasaw Cession lieu lands];

c. "That ... the defendants ... be enjoined and directed to take such actions as are necessary and appropriate to this set aside and make available for the use and benefit of the plaintiffs ... a fund or funds of such value and in such amount as may reasonably be necessary to:

1. Provide annual income to the respective Chickasaw Cession school districts hereafter at a level equivalent to the level of income which each could reasonably expect to enjoy if the district still owned in trust its original Chickasaw Cession sixteenth section lands or its original Chickasaw Cession lieu lands, whichever are the more valuable, and said lands were given over to their highest and best income producing use, and in addition,

2. To compensate and make whole plaintiffs and the plaintiff

class for all income their respective school districts could have received from 1832 to the present if they had been receiving the income from their respective Chickasaw Cession sixteenth section lands or, in the alternative, their respective Chickasaw Cession lieu lands, if such lands had been subjected to such prudent use and reasonable management ... as would have been required of trustees holding properties in trust and as would have produced maximum levels of annual income, and

3. To compensate plaintiffs and the plaintiff class for the interest that would have been earned on the funds described in (b)[2] above had said funds been received annually and immediately thereafter invested at the best rate of interest then available, and further, had said funds remained so invested continuously until

this time with interest compounded annually."

d. "Acquire, set aside, and make available for the use and benefit of the plaintiffs and the plaintiff class ... appropriate new lieu lands (which may include offshore oil, gas, and other mineral rights and interests owned by ... the State of Mississippi)";

e. "Take any and all other steps or actions as may be reasonably necessary or appropriate to:

1. Make available to plaintiffs and the plaintiff class properties of value equivalent to the current fair market value of the properties [allegedly] unlawfully sold ... or

2. Make available to plaintiffs and the plaintiff class in perpetuity income at such level as may be equitable and just, or

3. Eliminate and compensate and for the future guarantee and protect plaintiffs and the plaintiff class against ... denials and deprivations of

their rights to due process of law and to the equal protection of the laws";

f. "Develop, prepare, and file with the Court ... a plan for the orderly implementation of the declaratory and injunctive relief otherwise granted."

The complaint makes no contention or allegation that any current statute, law, or constitutional provision of the State of Mississippi is unconstitutional, nor do petitioners seek to have any so declared. The petitioners make no assertion in the complaint as to the provisions of the State or Federal Constitutions which were in effect at the time of the lease and sale of the lieu lands in question.

The respondents filed their motion to dismiss on October 2, 1981, and set forth various grounds therefor, including failure to state a claim, the Eleventh Amendment jurisdictional bar, applicable statutes of limitation, lack of standing to bring the action, and laches. Each of these positions, together with other grounds

were briefed, argued, and presented to the District Court.

The District Court, on January 20, 1984, dismissed the complaint against all state defendants based on the Eleventh Amendment jurisdictional bar and the applicable statutes of limitation. The United States Court of Appeals for the Fifth Circuit affirmed this dismissal on June 5, 1985, and the Petition for Rehearing and Suggestion of Rehearing En Banc was denied on May 21, 1985.

VI. REASONS FOR DENYING THE WRIT

A.

Should Certiorari Be
Granted To Consider A Claim
Seeking Damages Against The
State Of Mississippi, Vari-
ous Agencies Thereof, And
Elected Public Officials Of
The State Of Mississippi In
Their Official Capacities
Under The Fourteenth Amend-
ment Which Is Jurisdic-
tionally Barred By The
Eleventh Amendment To The
Constitution Of The United
States.

The United States Court of Appeals for the Fifth Circuit in affirming the District Court's dismissal relied upon various decisions of this Court addressing the Eleventh Amendment jurisdictional bar including Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984).

The District and Circuit courts were eminently correct in dismissing the complaint in this matter on the basis of the Eleventh Amendment jurisdictional bar as provided by the United States Constitution.

Recent case authority holds that, at most, plaintiffs are only entitled to the relief requested in the complaint. Mississippi University for Women v. Hogan, 458 U.S. 718, 723, 102 S.Ct. 331, 73 L.Ed.2d 1090, 1097, fn. 7 (1982). Here, the petitioners seek only "dollars or dirt" from the respondents.

The Eleventh Amendment to the Constitution of the United States provides a constitutional jurisdictional bar to the petitioners bringing

this action in the United States District Court for any type of relief, whether prospective or retroactive, because this is, in effect, a suit against the State of Mississippi which it has not consented to. Edelman v. Jordan, 415 U.S. 651, 662, 663, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974); Florida Department of Health v. Florida Nursing Home Association, 450 U.S. 147, 67 L.Ed.2d 132, 101 S.Ct. 1032 (1981); Alabama v. Pugh, 438 U.S. 781, 57 L.Ed.2d 1114, 96 S.Ct. 2666 (1978); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 89 L.Ed. 389 (1945); Louisiana v. Jumel, 107 U.S. 711, 720-723, 727-728 (1892); Corey v. White, 457 U.S. 85, 91, 71 L.Ed.2d 694, 102 S.Ct. 2325 (1982); Pennhurst v. Halderman, 465 U.S. 89, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984); Atascadero State Hospital v. Scanlon, 473 U.S. ___, 87 L.Ed.2d 171, 105 S.Ct. ___ (1985); and Gay Student Services v. Texas A & M University, 737 F.2d 1317 (5th Cir. 1984).

The Eleventh Amendment to the Constitution of the United States reads as follows:

The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.

Although this amendment on its face does not bar suits against a state by its own citizens, this Court has consistently held that such suits are barred unless the particular state has consented to suit. See, Edelman v. Jordan, supra, at 662, 663. Florida v. Treasure Salvors, Inc., 458 U.S. 670, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982); Atascadero, supra. It is clear that in the absence of consent, a suit in which a state or one of its agencies or departments is the defendant is judicially barred by the Eleventh Amendment. In the State of Mississippi, statutory waiver is necessary. Horne v. State Building Comm., 233 M. 810, 103 So.2d 373 (1958), as this Court has also found in

Florida Department of Health v. Florida Nursing Home Association, supra, and Alabama v. Pugh, 328 U.S. 781, 57 L.Ed.2d 1114, 98 S.Ct. 3057 (1978). This jurisdictional bar applies regardless of the relief sought. Missouri v. Fisk, 290 U.S. 18, 27, 78 L.Ed. 145, 54 S.Ct. 18 (1933).

There is not room for doubt that the State of Mississippi, the Board of Education, and the Lieu Land Commission cannot be sued in the federal courts pursuant to the Eleventh Amendment jurisdictional bar. Alabama v. Pugh, supra. This jurisdictional bar applies likewise to the named defendants as the allegations in this cause are couched, and, as the lower courts found, since the Eleventh Amendment bars a suit against state officials when "the state is the real substantial party in interest." Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 89 L.Ed. 389 (1945); In Re Ayers, 123

U.S. 443, 487-489 (1887); Louisiana v. Jumel, 107 U.S. 711, 720-723, 727-728 (1982).

Thus "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." Hawaii v. Gordon, 373 U.S. 57, 58, 10 L.Ed.2d 191, 83 S.Ct. 1052 (1963) (per curiam). "And as when the State itself is named as the defendant, a suit against state offices, that is, in fact, a suit against a state is barred regardless of whether it seeks damages or injunctive relief. See, Corey v. White, 457 U.S. 85, 91, 41 L.Ed.2d 694, 102 S.Ct. 2325 (1982). (Emphasis supplied).

Pennhurst v. Halderman, 465 U.S. 89, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984).

In Pennhurst, the Court went further in footnote 11 citing Dugan v. Rank, 372 U.S. 609, 10 L.Ed.2d 15, 83 S.Ct. 999 (1963), to say:

The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain or interfere with the public administration, or if the effect of the judgment would be "restrain the Government from acting or to compel it to act."

It is beyond dispute that the relief sought by petitioners in their complaint, although now alleged to be only a suit for a mandatory injunction and not for retroactive relief, would "expend itself on the public treasury or domain" of the State of Mississippi and "interfere with the public administration" of the state and "restrain the [State of Mississippi] from acting" or, in the alternative, "compel it to act," and cause property to be disposed of belonging to the State of Mississippi.

As to the boards and commissions on which the individually named defendants serve, although not specifically named as defendants, this Court in Alabama v. Pugh, supra, put it very plainly:

Among the claims raised here by petitioners is that the issuance of a mandatory injunction against the State of Alabama and the Alabama Board of Corrections is unconstitutional because the Eleventh Amendment prohibits federal courts from entertaining suits by private parties against states and their agencies There can be no doubt ... that

suit against the state and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit.

Of course, the Lieu Land Commission and the Board of Education are agencies of the State of Mississippi in the same manner that the Department of Corrections is an agency of the State of Alabama. The petition and complaint as filed in this matter do not even allege that the immunity of the State of Mississippi, the Lieu Land Commission, and/or the Board of Education has been waived or that any consent has been given to this suit. Further, the State of Mississippi has never consented to waive even its sovereign immunity in state court. See Chapter 474, Miss. General Laws of 1985, which re-establishes sovereign immunity through July 1, 1986, and waives the immunity only for claims accruing after that date but specifically does not waive Eleventh Amendment immunity. Specifically, § 3(4) of this Act provides that "nothing in this act shall be

construed to waive the immunity of the state from suit in federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States." This specific language was cited with approval in Pennhurst, supra, at footnote 12.

Further, the Mississippi Supreme Court has stated in Pruett v. City of Rosedale, 421 So.2d 1046 (Miss. 1983):

We do not abolish by this opinion the historical and well-recognized principle of immunity granted to all legislative, judicial and executive bodies and those public officers who are visited with discretionary authority, which principle of immunity rests upon an entirely different basis and is left intact by this decision.

Therefore, certiorari is not merited on the basis of any federal claim.

B.

Should Certiorari Be Granted To Consider A Pendent State Law Claim Seeking Damages Against The State Of Mississippi, Various Agencies Thereof, And Elected Public Officials Of The State Of Mississippi In Their Official Capacities Which Is Also Jurisdictionally Barred By The Eleventh Amendment To The Constitution Of The United States.

As to any contention by the petitioners that they have asserted a pendent state law claim and, therefore, the Eleventh Amendment jurisdictional bar does not apply, Pennhurst, supra, also lays this issue to rest:

A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Pennhurst, supra, at 79 L.Ed.2d at 82.

Any claim by the petitioners that they are seeking prospective relief only simply will not survive close scrutiny of the complaint. What they are seeking are "dollars or dirt," and the only thing "prospective" about the relief sought is that it would have to be paid in the future from the public treasury or domain of the State of Mississippi after a decision favorable to the petitioners. The Pennhurst decision recognizes this in footnote 25 found on page 87:

To say that injunctive relief against state officials acting in their official capacity does not run against the state is to resort to the fictions that characterize the dissent's theories. Unlike the English sovereign, perhaps, an American State can act only through its officials. It is true that the court in Edelman recognized that retroactive relief often, or at least sometimes, has a greater impact on the state treasury than does injunctive relief, see 415 U.S. 666, n. 11, but there was no suggestion damages alone were thought to run against the state while injunctive relief did not.

Pennhurst, supra, at 79 L.Ed.2d 87.

This Court's decision in Edelman v. Jordan, supra, is of particular note since it provides:

It is well established that even though a state is not named as a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1945), the Court said:

[W]hen the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are named defendants. Id., at 464, 89 L.Ed. 389.

The Edelman Court did not stop here, however, but went even further to find that:

Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. Great Northern Life Insurance Co. v. Read, supra; Kennecott

Copper Corp. v. State Tax Commission, 327 U.S. 573, 90 L.Ed. 862, 66 S.Ct. 745 (1946).

What could be more on point? In the instant matter, the petitioners seek ("by legislative appropriation or otherwise") the establishment of a fund for the use and benefit of the plaintiffs having such amount of money or value as reasonably necessary to:

a. to provide annual income to the plaintiffs at a level which each school district could expect if the district still owned the original Chickasaw Cession sixteenth section lands or lieu lands, whichever are the most valuable,

b. "to compensate, reimburse and make restitution" to each school district for all income each would have received from 1832 to the present if each district had been receiving income from its respective Chickasaw Cession sixteenth section lands or lieu lands,

c. acquire and make available for the use and benefit of the plaintiff class appropriate lieu lands of the same value as the original Chickasaw Cession sixteenth section lands, and

d. other relief in the form of interest which may have been earned on the funds derived from the lease of such Chickasaw Cession sixteenth section lands or lieu lands.

If this is not a prayer for retroactive relief or an impingement on the state treasury, then what would be? Petitioners seek retroactive damages, and it can be classified as nothing else, from the State of Mississippi. Certainly, the named individual defendants cannot provide the relief requested, and it would have to be by legislative act. Therefore, although the petition is drawn in artful terms as to the named individual official defendants, it still could not, upon close examination, evade or circumvent the Eleventh Amendment jurisdictional bar. See, Gay Student Services v. Texas A & M University, supra.

Therefore, certiorari is not merited on the basis of any pendent state law claim.

CONCLUSION

The petitioners' contentions pose no question of particular moment or present any indecision in the case law of the land, and it is, therefore, respectfully submitted that the Petition for Writ of Certiorari in all justice should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. Lloyd Arnold, an Assistant Attorney General for the State of Mississippi and Counsel of Record for the Respondents herein, do hereby certify that I have this day caused three (3) true and correct copies of the above and foregoing **Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit** to be served upon the following:

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This, the 12th day of November, 1985.

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